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No. _____

In The
Supreme Court of the United States

WILLIAM DUPRE,
Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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July 7, 2008

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QUESTIONS PRESENTED

1. Whether there are any circumstances under which a party litigant's exorbitant campaign contributions, made to the presiding judge and/or justice, while the matter is pending, can violate the opposing party's right to an impartial tribunal.

2. Whether Ohio can deprive Petitioner of his right to an impartial tribunal by claiming that it lacks a procedural remedy for the violation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Smart Media of Delaware, Inc. was a counterclaimant-appellee/movant/appellant below and will likely join in William Dupre's petition, or will file its own petition at a later date. Respondent Telxon Corporation is a wholly-owned subsidiary of Respondent Symbol Technologies, Inc., which is a wholly-owned subsidiary of Motorola, Inc.

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I. A right to an impartial tribunal is little better than no right at all when judges are free to preside over matters where parties have already contributed exorbitant sums to their campaigns, or where a party

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II. This Court should hear the matter because neither Ohio, nor any other State, is free to deny a litigant his right to an impartial tribunal by denying him a procedural remedy through which he can enforce that right. 22

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Dupre respectfully submits this petition for a writ of certiorari to review the judgment of the Ohio Supreme Court in which it declined jurisdiction to review the judgment rendered by the appointed panel for Ohio's Ninth District Court of Appeals.

OPINIONS BELOW

The opinion of the Ohio Supreme Court declining jurisdiction and the opinion of the appointed appellate panel are not reported but are attached to Petitioner's Appendix.

JURISDICTION

The Ohio Supreme Court entered judgment on April, 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Introduction.

In *UpJohn Co., v. United States*, 449 U.S. 383, 393 (1981), this Court observed that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Regrettably, a litigant's right to an impartial tribunal, as articulated by a majority of this Court in *Republican Party v. White*, 536 U.S. 765, 775-76 (2002), has become so obscured by the influx of campaign contributions into the judicial process, that to the extent the right still exists, it is little better than no right at all. The absence of a pronouncement by this Court as to whether a litigant's right to an impartial tribunal can be violated by campaign contributions has resulted in both inter-state and intra-state conflicts regarding the application of this constitutional right.

The courts of last resort in the respective states are in total disagreement as to whether a litigant's right to an impartial tribunal is violated as the result of campaign contributions made by one of the parties to a judge while a matter is proceeding before that judge. *Compare Pierce v. Pierce,* 39 P. 3d 791, 798-99 (Okla. 2001) (ruling that the judge's failure to self disqualify after receiving two $5,000 contributions constituted "a violation of due process"), *with Caperton v. A.T. Massey Coal Co.,* No. 33350, 2008 W. Va. LEXIS 22, *205 n.16 (W. Va. Mar. 12, 2008) (where the dissent criticized the majority's failure to acknowledge the due process implications of presiding over a matter where one of the parties had contributed approximately $3.5

million to the campaign of a sitting justice). Not unlike West Virginia, in Ohio the answer to the question of whether a litigant's right to an impartial tribunal is violated by excessive and well-timed campaign contributions is completely dependent upon which judge is being asked. *Compare* Pet. App. at 11-12a, ("A fair trial in a fair tribunal is a basic requirement of due process." *Citing Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), *with* Pet. App. at 1a (finding no "substantial" constitutional question).

From this sea of uncertainty, arises a leviathan of a case in which a "$212 million plus judgment [was] erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual." Pet. App. at 18a.

II. Background.

For those who do not follow politics in Ohio, it is difficult to appreciate the context of what occurred below without knowing Alex Arshinkoff. Arshinkoff is the Chairman of the Summit County Republican Party and was the conduit for the "approximately $1,000,000.00 in contributions" given by the former CEO and Chairman of Respondent Telxon Corporation, Robert F. Meyerson. Pet. App. at 18a. Arshinkoff is said to run the Summit County Republican Party as a "Tammany Hall" style machine. *See,* Sandy Theis, *Democrat Questions Petro Endorsement of Montgomery*, Cleveland Plain Dealer, Mar. 3, 2006, at B2. The person who made the observation was a member of Arshinkoff's party and former Ohio Attorney General. *Id.* The Akron Beacon

Journal's editorial board has gone so far as to describe Arshinkoff as a "serial political bully." Editorial, *The Arshinkoff Effect*, Akron Beacon Journal, Sept. 30, 2005, at B3. The Ohio judiciary has not been immune from Arshinkoff's attempts to exert his influence.

In 1984, Arshinkoff was successfully sued for blocking a member of his own party from having his name placed on the primary ballot for judge. *Ohio Ex. rel. Morgan v. Arshinkoff*, 472 N.E.2d 1134, 1136 (Ohio Ct. App. 1984). After a 2002 judicial election for Summit County Probate Court, Arshinkoff's candidate was reprimanded by the Office of Disciplinary Counsel for a case that involved "in kind" campaign contributions made by the party and the "inappropriate content" of an advertisement that was produced by Arshinkoff. *Disciplinary Counsel v. Spicer*, 834 N.E.2d 332, 335-36 (Ohio 2005). By September 2005, Arshinkoff was refusing to take no for an answer and two judges from within his party signed affidavits of prejudice indicating that Arshinkoff had engaged in "judicial intimidation." Lisa A. Abraham, *Judges Say Official Tried to Interfere*, Akron Beacon Journal, Sept. 28, 2005, at B5. When asked to explain his behavior, Arshinkoff indicated that he was simply exercising his right to speak freely. *The Arshinkoff Effect*, *supra*, at B3.

By November of 2005, the press was openly questioning the independence of Summit County judicial candidates who were backed by Arshinkoff. Editorial, *Toadies on the Bench,* Akron Beacon Journal, Nov. 4, 2005. Within two years, Summit County Republicans became concerned that Arshinkoff was becoming more of a liability than an asset and

undertook efforts to end his "three-decade reign." Phil Trexler & Katie Byrd, *Summit GOP's Arshinkoff Challenged*, Akron Beacon Journal, Aug. 18, 2007, at A1. During the intra-party battle, it was revealed that the Summit County Republican Party's financial records were "impossible to audit." Stephanie Warsmith, *Mistakes Fill GOP Finance Reports*, Akron Beacon Journal, Dec. 27, 2007, at A1. That an employee of the Summit County Board of Elections would issue such a statement was no small matter as Arshinkoff was also a board member. *Id.*

These reports led to apprehension within the party that Arshinkoff simply exercised too much power through his control of campaign funds. Julie Carr, *GOP Chief Under Fire*, Associated Press, Columbus Dispatch, Mar. 10, 2008, *available at* www.dispatchpolitics.com/live/content/local_news/stories/2008/03/10/z-apoh_party_boss_0310.ART_ART_03-10-08_B5_FM9JJ6P.html?sid=101. "Arshinkoff's demands that donors give to the party, rather than spreading their contributions among the individual candidates, is both the source of the party's might and heart of the criticism against it." *Id.* In March 2008, Arshinkoff was removed from the Board of Elections by the Ohio Secretary of State because of reports that the Board's employees were being harassed, intimidated and threatened. *Id.* Notwithstanding the foregoing, the coup attempt against Arshinkoff failed in late spring of this year and he continues to serve as one of the most powerful and notorious party county chairmen in Ohio.

III. Procedural History.

On December 1, 1998, Respondent Telxon Corporation (Telxon) filed a complaint against Petitioner's former employer, Smart Media of Delaware, Inc. (Smart Media) in the Summit County Court of Common Pleas. The complaint was a declaratory judgment action seeking a determination that Telxon had not entered into any contracts and had not made any promises that could reasonably be relied upon. Petitioner William Dupre (Dupre) and Smart Media, both of whom resided outside of Ohio, filed counterclaims and the case proceeded to trial on August 25, 2003. Dupre's claims sounded in fraud, breach of contract and promissory estoppel and arose from Telxon's broken promises to invest $6 million in Smart Media, a start-up company, and to develop the prototype for an internet based self-scanning device known as the Smart Handle. In reliance upon these promises Dupre left his job as an executive with a retail marketing company. After nine months of promises and delay, Telxon pulled the rug out from under both Dupre and Smart Media and indicated that it had no intention of honoring its agreement. In September 2003, after a three-week trial, the jury returned verdicts in favor of Dupre and Smart Media in the amounts of $6.2 million and $212 million, respectively.

The judgments were appealed to the Ninth District Court of Appeals in Summit County Ohio. On September 25, 2005, Judge William Batchelder authored a vitriolic 119-page opinion on behalf of the majority of the court, belittling the litigants, chastising their counsel, insulting the trial judge, and ultimately

reversing all of the jury's verdicts. The decision was not unanimous as Judge Carr, a Republican, demonstrated considerable courage and dissented. On the exact same day the decision was announced, Judge Batchelder left the bench to run for the Ohio House of Representatives.

Dupre filed a notice of appeal with the Ohio Supreme Court seeking a reversal of the decision because: (1) Judge Batchelder's decision eviscerated controlling precedent; (2) Judge Batchelder's decision substituted case law from foreign jurisdictions for Ohio precedent in order to justify the result that was ultimately reached; (3) Judge Batchelder ignored evidence and argument that supported Dupre's position; and (4) Judge Batchelder's decision contained conclusions based upon facts that were not presented by the record.[1] By way of a 4-3 vote, the Ohio Supreme Court declined jurisdiction on February 22, 2006.

For months, the matter was closed. Then on January 9, 2007, Smart Media filed a motion to vacate the judgment that was entered by the Ninth District Court of Appeals based upon the discovery of $1,000,000.00 in campaign contributions made by the former CEO and Chairman of Telxon, Robert F.

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[1] Although Dupre provided excruciating detail as to the fundamental flaws in Judge Batchelder's decision before the Ohio Supreme Court, and Smart Media provided the same in its motion to vacate the judgment, neither the appointed panel nor the Ohio Supreme Court addressed the merits of Judge Batchelder's ruling. As the factual and legal flaws in the original decision are collateral to the issues on this appeal, they will be provided if this Court requests briefing on the issue.

Meyerson, to the Summit County Republican Party, all while the case was pending.[2] Three days later, the Akron Beacon Journal printed an article that attributed direct quotes to Judge Batchelder. Phil Trexler, *Ex-Judge is Accused of Bias; Company That Lost $212 Million Verdict on Appeal Contends Donations to GOP Influenced Decision,* Akron Beacon Journal, Jan. 12, 2007, at B1. In that article, Judge Batchelder indicated, for the first time, that he was close enough to Meyerson to have visited with him at his home, and that while he was presiding over the appeal Judge Batchelder knew that Meyerson had been a witness in the case. *Id.*

Then, in an act that was unprecedented in Ohio's history, the entire Ninth District Court of Appeals recused itself *sua sponte*. The appellate court reasoned that its recusal was necessary to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the pubic the unquestioned neutrality of an impartial panel of judges. Dupre joined in Smart Media's motion and also moved for leave to file an untimely motion for reconsideration pursuant to Ohio App. R. 14. Chief Justice Moyer, a Republican, appointed a panel of three judges to preside over the matter. The panel consisted of two Republicans and one Democrat.

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[2] In the past, Respondents have contended that Meyerson was no longer the CEO of Telxon while the case was pending. While that may be true, Meyerson stayed on as a member of Telxon's board and later as a consultant. The exact date of his formal departure has not yet been established. However, SEC records that were cited below indicate that Meyerson was still affiliated with Telxon while the case was pending.

Although neither Dupre nor Smart Media were permitted to conduct discovery, a good deal of information came to light. The majority's recitation of the facts is as follows:

> Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and long standing contributor. At a time when Meyerson is said to have known about the pending litigation – as early as the spring of 2000 – Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during the calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign). During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives – prior to his elevation to the bench – Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's) home following receipt of the political

> contribution. That sum - $15,000 – is described as nearly one third of the total funds raised for Batchelder's House campaign for that election cycle.

Pet. App. at 5a.

Unfortunately, the majority of the appointed panel ignored both Dupre's due process argument and the issue of fundamental fairness and instead focused on "whether [Dupre and Smart Media] have a procedural avenue available to seek their requested relief." App. at 6a. Incredibly, the majority answered its own inquiry in the negative and concluded that there was no remedy for the denial of Dupre's right to an impartial tribunal. *Id.* at 6-8a. In doing so, the majority went so far as to create *ex post facto instanter* requirement that Dupre attach a motion to reconsider to his motion for leave to file the motion for reconsideration. *Id.* The panel's decision was along party lines.

As noted by the dissent, the majority's decision did not pass constitutional scrutiny under this Court's precedent:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision.

> Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to average man as a judge...not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.'
>
> Such a stringent rule may sometimes bar trial by judges who have not actual bias and who would do their very best to weight the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.'

Pet. App. at 11-12a, *citing Tumey,* 273 U.S. at 532, *In re Murchison*, 349 U.S. 133, 136 (1955); *and, Offutt v. United States*, 348 U.S. 11, 14 (1954).

The dissenting judge went on to note that the appellate panel's original decision, if left intact, amounted to "appellate nullification" and threatened the very foundation of the rule of law:

> A $212,000,000.00 plus judgment erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual since the inception of the case, creates a classic scenario giving rise to every nuance of political influence in our courts which calls for self-disqualification.
>
> ***

> [T]he multitude of factors present in these proceeding by which the judge's (judges') impartiality might reasonably be questioned are so strongly supportive of the appearance of impropriety they challenge Canons 3 and 4 and mandate self-disqualification lest appellate nullification joins jury nullification to avoid the effectiveness of our duly enacted laws.

Pet. App. at 18a-19a.

Dupre filed his second memorandum in support of jurisdiction with the Ohio Supreme Court stating, unequivocally, that it would be unconstitutional for Ohio not to have a remedy for a violation of his constitutional right to due process, and that the appointed panel's newly created *ex post facto instanter* requirement appeared to be the type of unprecedented and novel change in state law specifically designed to justify the denial of a citizen's constitutional rights. Dupre also noted that two of the four Justices who voted not to accept the case the first time had also received hundreds of thousands of dollars in campaign contributions from Meyerson, either directly or via campaign committees.

When neither Justice voluntarily recused him or herself, Smart Media filed a motion to have Chief Justice Moyer disqualify Justice Maureen O'Connor. *See,* The Supreme Court of Ohio, Case Information, Case No. 2007-2321, *available at* http://www.sconet.state.oh.us/clerk_of_court/ecms/resultsbycasenumber.asp?type=3&year=2007&number=2321&myPage=searchbyentityname.asp. Of particular concern were the following facts: (1) in 1998, Meyerson and his

family had given $52,000.00 directly to Justice O'Connor's campaign for Lieutenant Governor; (2) the Taft/O'Connor campaign received $218,900.00 from the Summit County Republican Party on December 21, 2001, or three months after Meyerson gave the Summit County Republican Party $212,500.00; (3) Justice O'Connor failed to disclose any of the contributions when she cast the deciding vote declining jurisdiction over the first appeal; and (4) O'Connor, Batchelder, and Arshinkoff all attended the August 29, 2007 Summit County Republican Finance dinner, all while Arshinkoff was staving off the coup attempt and the case was pending before the appointed panel. *Id.*

In addition to the contributions contained in Smart Media's motion, the press reported that Meyerson appeared to have contributed another $176,000.00 to Justice O'Connor for her 2002 Ohio Supreme Court race: "Meyerson also contributed $215,000 to the Republican National State Elections Committee, former Congressman Tom DeLay's elaborate laundering system, for which he was accused of violating election laws in 2005." Denise Grollmus, *Justice Maureen O'Connor Says Campaign Money Doesn't Affect Her*, Cleveland Scene Magazine, Mar. 19, 2008, at 11. "The committee then gave the money to the Ohio GOP, which in turn donated $176,000 to O'Connor. (Meyerson did not return *Scene*'s phone calls.)" *Id.* This sequence of events can be verified by public filings at the Ohio Secretary of State's web site. *Available at* http://www2.sos.state.oh.us/portal/page?_pageid=34,56478,34_56508&_dad=portal&_schema=PORTAL. All of the aforementioned contributions occurred during the pendency of the litigation. No formal ruling or order was issued regarding the motion

to disqualify Justice O'Connor. *See,* Supreme Court of Ohio, Case Information, Case No. 2007-2321, *supra.* However, Justice O'Connor did send an email to the Clerk of Court for the Ohio Supreme Court stating, without explanation, that she would not recuse herself. *Id.*

Justice O'Connor continued to be completely unfazed by the conflict of interest concerns arising from this case. After the appointed panel issued its decision, Justice O'Connor was reported to have sent attorneys who appeared at oral argument before the Ohio Supreme Court invitations to her fundraisers while their cases were pending before the Court. Grollmus, *supra*. In the first two months of 2008 alone, Justice O'Connor raised more than $200,000.00. *Id.* While Dupre's memorandum in support of jurisdiction was pending, Justice O'Connor also attended the Summit Republican's Lincoln Day dinner, which was hosted by Arshinkoff. Posting of Denise Grollmus to the Cleveland Scene Magazine, *Is the Ohio Supreme Court Rigged in Alex Arshinkoff's Favor? at* http://blogs.clevescene.com/cnotes/2008/03/is_the_ohio_supreme_court_rigg.php (Mar. 31, 2008, 05:37 EST). *At this public event,* Arshinkoff referred to Justice O'Connor as his "protégée" before complaining about the Ohio Secretary of State's decision to remove him from Summit County Board of Elections. *Id.* While at this event and while his case against the Secretary was pending before the Ohio Supreme Court, Arshinkoff asked Justice O'Connor whether she would make a decision based upon hearsay. *Id.* Justice O'Connor is reported to have smiled in response. *Id.*

On April 9, 2008, the Ohio Supreme Court declined to hear Dupre's appeal on the grounds that there was no "substantial" constitutional question. *See*, App. at 1a. No indication of how the Justices voted is contained in the order and only Chief Justice Moyer's signature is listed. *Id.* The Rules of Practice for the Supreme Court of Ohio indicate that an appeal that alleges "a substantial constitutional question" is a claimed appeal of right. Ohio S.Ct. Prac. R. II (1)(A)(2). In order for the Court to deny the appeal, as it did here, it must necessarily reject the appellant's argument that his constitutional rights were violated. *Id.* The Rules of Practice for the Ohio Supreme Court categorize truly "discretionary" appeals differently. *See*, Ohio S.Ct. Prac. R. II, § (1)(A)(3).

Meanwhile, Judge Batchelder announced that he is seeking to become Ohio's next Speaker of the House and recently indicated that he has donated $125,000.00 to the Ohio House Republican Caucus. *See,* Posting of Aaron Marshall to The Plain Dealer Politics Blog, *Ability to Raise Cash is Key in Winning Ohio House Speaker Post,* http://blog.cleveland.com/openers/2008/06/speaker.html (June 23, 2008, 00:20 EST). Petitioner William Dupre, a Chicago resident, stands before this Court astounded that such a series of events could occur within the United States of America.

REASONS FOR GRANTING THE PETITION

I. A right to an impartial tribunal is little better than no right at all when judges are free to preside over matters where parties have already contributed exorbitant sums to their campaigns, or where a party contributes large sums while the case is pending.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986), this Court held that a state supreme court justice who authored an opinion that consequently resulted in his recovery of $30,000.00 from a similar case crossed over "the outer boundaries of judicial qualification" established by Due Process Clause. *Id.* Dupre asks this Court to consider whether hundreds of thousands of dollars, if not millions, in the form of campaign contributions, "would offer possible temptation to the average...judge to... lead him not to hold the balance nice, clear and true." *Id.* at 822, *citing, Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Dupre does not ask this Court to conclude that any campaign contribution to any judge implicates a litigant's right to an impartial tribunal or requires disqualification. However, the opposite proposition, that campaign contributions, regardless of the amounts, timing, or manner in which they are made, can never cross over "the outer boundaries of judicial qualification" established by Due Process Clause, stretches reason beyond its limits. *Lavoie*, 475 U.S. at 828. In *Ward*, this Court concluded that a mayor's ability to raise revenue for his village disqualified him

from adjudicating cases involving minor traffic tickets. *Ward,* 409 U.S. at 60. This type of indirect benefit pales in comparison to the benefits that flow from a candidate's ability to have a readily accessible war chest. Not having to lend oneself campaign funds is a direct benefit to that candidate. A large reserve of funds for a campaign can discourage formidable opponents from entering a race against a candidate. The ability to hire a paid staff to undertake the work of a campaign directly benefits the candidate. Clearly the ability to obtain or retain a paid elected office is a direct benefit to the officeholder. Rarely, if ever, are these benefits available to a judicial candidate who does not receive campaign contributions.

Moreover, this Court has repeatedly noted that the reach of the Due Process Clause is not limited to those circumstances were actual bias is proven, but extends to those situations where the appearance of fairness is lacking. *See, In re: Murchison*, 349 U.S. 133, 136 (1955). Due process "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, ... by ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also, Peters v. Kiff*, 407 U.S. 493, 502 (1972) (noting that "due process is denied by circumstances that create the likelihood or appearance of bias"). It cannot credibly be argued that either the case *sub judice*, or the general practice of litigants contributing vast sums to judges who have their cases pending before them, satisfy the appearance of fairness.

To recount: (1) the former Chairman of the Board and CEO ("Chairman") of one of the parties had a sizable pecuniary interest in the outcome of the litigation and was a key witness during discovery and trial; (2) the candidate who eventually became the authoring judge visited the Chairman's home in order to solicit a contribution; (3) the Chairman contributed $15,000 directly to that candidate, which constituted more than one third of the candidate's total contributions; (4) the Chairman then contributed over $650,000 to a county party between the time it was proven that the Chairman learned of the litigation and its conclusion on appeal; (5) those contributions made the Chairman the largest contributor to the county party; (6) the county party then contributed $20,000 to the authoring judge; (7) the county party was and is controlled by a serial political bully with a history of intimidating judges within his party (8) the case resulted in the largest verdict in the County's history; (9) while the case was on appeal, the judge who authored the appellate decision learned that the Chairman was a witness; (10) the judge who authored the appellate decision failed to disclose either his prior relationship with the Chairman or the contributions he received from the Chairman; (11) the Chairman contributed an additional $25,000.00 to the party's judicial fund weeks after oral arguments; (12) the judge authored a factually and legally erroneous decision that favored the Chairman's position; (13) the appellate court's judgment was decided by one vote; (14) on the day the decision was announced, the judge who authored the decision announced he was leaving the bench to run for the State House of Representatives; and (15) when the information was discovered and called to the attention of the appellate

court, the entire court recused itself from hearing Dupre's motions *sua sponte*.

At the state supreme court level, the following occurred: (1) the state supreme court initially declined jurisdiction by a vote of 4-3; (2) two of the justices who voted to decline jurisdiction received hundreds of thousands of dollars from the Chairman, directly, through committees or the state party, or via the serial political bully with a history of intimidating judges; (3) neither justice disclosed this information or offered to recuse him or herself; (4) after the information was discovered and the matter was again pending before the state supreme court, neither Justice voluntarily recused his or herself; (5) one of justice's made her decision known, not through a written opinion, but by way of an email to the state supreme court's clerk of court; and (6) notwithstanding all of the foregoing, and the fact that one of judges on the appointed panel found a constitutional violation, and the fact that the Oklahoma Supreme Court's decision in *Pierce* was presented to the court, the state supreme court declined jurisdiction a second time finding no substantial constitutional question. To describe this series of events as *appearing fair* to Dupre, or as even being *fair* to Dupre, would require the narrator to distort the English language beyond recognition.

This Court has indicated that individuals have a First Amendment right to make campaign contributions to candidates, and has implied that, although such contributions can impact a judge's impartiality, this right may extend to contributions to judicial candidates. *White,* 536 U.S. at 788-92. However, it would be a distortion of this Court's basic

reasoning in regard to such political activity to suggest that all contributions made to judges or judicial candidates are shielded from constitutional scrutiny by the First Amendment. Where, as is the case here, it appears as though contributions have been made in excess of established statutory limits, by a litigant through the use of committees or political parties, any presumption of legitimacy arising from the First Amendment cannot exist. *See,* Ohio Code of Judicial Conduct, Canon 7(C)(5)(a)(i) (Although the limits have been raised over the years, the 2008 version of the Canon establishes a $3,000.00 limit for individual contributions to Supreme Court candidates and a $1,000.00 limit for individual contributions to candidates for appellate courts).

While an individual might have the right to contribute to a candidate who shares the same general judicial philosophy, it does not follow that a party has a right to contribute large sums to a judge who is deciding that party's case. Indeed, from the perspective of the litigant, a candidate's general judicial philosophy places a distant second behind a judge's specific views regarding the pending matter. *See,* Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, The N.Y. Times, Jan. 29, 2008, at A14 (where Professor Palmer's study concluded that "[i]t's the donation, not the underlying philosophical orientation, that appears to account for the voting outcome.") Equally unpersuasive is the notion that a party has a First Amendment right to have the particular judge he or she heavily contributed to preside over the party's case. Finally, when the sums contributed to a judge become truly exorbitant, states should be required to ensure that the contributing

party's right to speech gives way to the opposing party's right to due process. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (ruling that "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.").

Implicitly recognizing the balance between these competing interests, at least one state supreme court has concluded that a judge's impartiality can reasonably be questioned based upon the circumstances surrounding the campaign contributions, and that where the judge's impartiality can reasonably be questioned, the judge's participation in the case amounts to a violation of the opposing party's right to due process. *Pierce,* 39 P.3d at 798. In *Pierce,* an attorney and the attorney's father both attended the presiding judge's fundraiser and contributed the statutory maximum, $5,000.00. *Id.* The question arises: if two $5,000.00 contributions can invoke the Due Process Clause in Oklahoma, then how can hundreds of thousands of dollars worth of contributions to the presiding judge or justice in Ohio, or millions in West Virginia, be constitutionally permitted? Unless this Court weighs in on the issue, the right to an impartial judge has deteriorated into a concept so uncertain that it is little better than no right at all.

II. This Court should hear the matter because neither Ohio, nor any other State, is free to deny a litigant his right to an impartial tribunal by denying him a procedural remedy through which he can enforce that right.

It is important to note that no judge on the appointed panel was willing to find that Judge Batchelder's prior participation in the case was appropriate or that the initial proceedings were fair to Dupre. Indeed, with the possible exception of Respondents' counsel, it would be difficult to find three individuals in all of Summit County who thought Judge Batchelder's participation in the case was appropriate or that the initial proceedings were fair to Dupre. Accordingly, the majority's conclusion, that Ohio had no remedy for these violations, cannot be an answer that comports with the requirements of the United States Constitution. *See*, *Lavoie,* 475 U.S. at 827-28 ("But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote."); *see also, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (observing that once it is determined that the Due Process Clause applies, the question of 'what process is due' is one answered by the United States Constitution); *Liljeberg v. Health Serv. Acquis. Corp.*, 486 U.S. 847, 868 (1988) ("If we focus on fairness to the particular litigants, a careful study of Judge Rubin's analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment... than there is of allowing a new judge to take a fresh look at the issues.").

Ohio is now the only state that has failed to provide a process for remedying a judgment authored by a judge who should not have heard the case and whose participation was material to the outcome. *See, Tesco American, Inc v. Strong Inds., Inc.*, 221 S.W.3d 550, 556 (Tex. 2006) (holding that a "judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified"); *see also, Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988) (where the entire Court vacated the initial decision and recused itself after discovering that the Justice who authored the initial opinion had a similar lawsuit); *Powell v. Anderson*, 660 N.W.2d 107, 122-23 (Minn. 2003) ("Although we can envision a case in which a disqualified judge's participation in an appellate panel was inconsequential enough that it would not infect the decision, this is not one of those cases."); *Pierce*, 39 P.3d at 799 ("Characterizing the error to disqualify as a violation of due process shows that the decree must be reversed.").

The majority of the panel not only failed to provide a procedural remedy to Dupre, it removed a procedural vehicle that already existed. *See*, Pet. App. at 6-8a. Ohio Appellate Rule 14(B) provides that a party may move *for leave* to file an untimely application for reconsideration if the party is able to demonstrate extraordinary circumstances. The majority as much as admitted that Dupre had established extraordinary circumstances, but then added a requirement not found in existing law. *Id.* Dupre did not file an untimely application for reconsideration because he had not been granted leave not file to file an untimely application for reconsideration. The reason the

majority claimed that Dupre could not have leave to file an application for reconsideration is that he did not "explain" why the case should be reconsidered. *Id.* The missing explanation would have been set forth in the application for reconsideration (which Dupre never received leave to file). That is the entire function of such a pleading.

After announcing the creation of this *ex post facto instanter* requirement, the majority did not then provide Dupre with an opportunity to explain why the case should be reconsidered. Instead, the majority ruled that Dupre's failure to divine the majority's unprecedented requirement was fatal. *Id.* This type of procedural chicanery cannot survive even the most cursory review of this Court's precedent. "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 682 (1930); *see also, Harper v. Va. Dept. of Taxn.*, 509 U.S. 86, 101 (1993).

If this Court has any doubt as to whether the majority truly believed a constitutional violation occurred below, it need only compare the gamesmanship employed by the majority with the actions of other state courts during the civil rights era. *See, Williams v. Georgia*, 349 U.S. 375, 389 (1955) ("Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to the motion does not deprive this Court of jurisdiction to find that a substantive issue is properly before us.");

NAACP v. Alabama, 377 U.S. 288, 297 (1964) ("The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form."); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

If this Court desires further evidence that Dupre's due process rights were violated, it need look no further than the majority's decision below. The majority could have expressly stated that the initial proceedings did not violate Dupre's right to an impartial tribunal. The majority remained silent on that issue. The majority could have said that Dupre did not meet his burden of proof in moving to vacate the Ninth District Court of Appeal's original judgment. Instead, the majority concluded that a motion to vacate a judgment was not available at the appellate level. The majority could have claimed that Dupre failed to demonstrate the "extraordinary circumstances" required by the language of Ohio App. R. 14(B). *Id.* The majority declined to do so. Rather, the majority speculated that Dupre would be unable to establish why the original decision was wrongly decided, without giving Dupre the opportunity to do so.

If the majority's decision can be read to reveal anything, it can be read to reveal that no judge on the appointed panel thought the initial proceedings comported with the general principles of fairness, due

process, or the appearance of justice. Having reached that conclusion, it was constitutionally impermissible for the Ohio court to conclude that Ohio did not have a remedy for the violation of Dupre's constitutional rights.

III. The Court should hear this matter because the current practices can only be expected to grow worse without this Court's intervention, and the public's faith in the judiciary is being destroyed.

When it comes to the practice of contributing large sums to judges who hear litigants' cases, the conduct of the litigants and judicial candidates grows ever more brazen without this Court's intervention. On October 10, 2000, the Ohio Chamber of Commerce issued a press release wherein it noted that "[i]n 75 cases where the Ohio Academy of Trial Lawyers (OATL) filed "friend of the court" briefs urging the court to take an action, the justices who received the most money from the trial attorneys voted overwhelmingly with the OATL position." Press Release, Ohio Chamber of Commerce, Chamber Study Shows Correlation Between Trial Lawyer Contributions, Supreme Court Decisions (Oct. 10, 2000), *available at* www.ohiochamber.com /Events/news_chamberstudy.asp. Had the Chamber raised its concerns with this Court then, Dupre may not be here today. However, the Chamber chose a different route.

In 2000, the Chamber formed an unregistered PAC known as Citizens for a Strong Ohio which spent $4.2 million for television advertising accusing a justice of

changing her votes based on campaign contributions. Editorial, *The Sleaze Merchants*, Toledo Blade, June 17, 2006, at A8. The Chamber eventually faced contempt charges after refusing to identify the donors who contributed the funds that paid for the advertising. Jim Provance, *High Court Disallows Appeal for Television Ad Privacy*, Toledo Blade, Dec. 28, 2004, at A1. The Chamber's conduct eventually became the subject of national scrutiny. Terry Carter, *Mud and Money*, 91 A.B.A.J. 40, Feb. 2005 (noting that the "[C]hamber is unrepentant in what it believes is a battle against waves of litigation that harm its members").

The Chamber's efforts continued throughout 2006, wherein it formed a new PAC, The Partnership for Ohio's Future. Rob Modic, *Law Firms Play Key Roles in High Court Campaigns*, Dayton Daily News, Oct. 21, 2006, at A6. The Partnership spent $1.28 million on advertising in favor of its two favorite choices, Justice Terrence O'Donnell and candidate Robert Cupp. *Id.* After asking "what happened to the spending limits," Justice O'Donnell's opponent was reported to have answered his own question: "These are only illegal money laundering operations." *Id.* By the end of 2006, the Chamber had obtained its desired result. The New York Times reported that Justice O'Donnell, who won reelection that year, voted with his contributors 91% of the time. Adam Liptak, *Campaign Cash Mirror's a High Court's Rulings,* N.Y Times, Oct. 1, 2006, at A1. In that article, Justice Paul Pfeifer summed up the state of affairs in Ohio for the national audience: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." *Id.* "Everyone interested in

contributing has very specific interests." *Id.* "They mean to be buying my vote."[3] *Id.*

Now, if the only two groups of people who entered civil courtrooms in Ohio were wealthy trial lawyers and consortiums of publicly traded corporations, then perhaps the axiom that turnabout is fair play would be applicable. However, the vast majority of citizens subject to the process are neither wealthy trial lawyers nor publicly traded companies. These individuals, and small businesses, have their constitutional rights obliterated by the cross-fire that arises from the tactics employed by these moneyed goliaths. This is a result that cannot continue, lest the individual's constitutional right to an impartial tribunal is reduced to a mere aspiration.

Even if voter approval of a candidate provided an exception to the Fourteenth Amendment's prohibition against unconstitutional conduct by a state actor (and it does not), the voters are not really presented with such a decision. The voter's choice is rarely between a judicial candidate who is beholden to contributors and

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[3] While it is permissible for both the press and Justices to speak out as to the system's ills, being critical of the system as an opponent of one of the Justices will earn you a trip to the Office of the Disciplinary Counsel. *See, O'Neil v. Coughlin* 511 F.3d. 638, 640 (6th Cir. 2008). In *O'Neil*, the Sixth Circuit reversed a district court's order enjoining the enforcement of three canons of the Ohio Code of Judicial Conduct. *Id.* The Court concluded that disciplinary proceedings against O'Neil could go forward notwithstanding the fact that two of the complaints stemmed from O'Neil's identification of his party affiliation and his action of "wrongfully [attacking] the credibility of the Ohio judiciary." *Id.*

a candidate who does not take contributions from attorneys and litigants. All too often, the voter's decision is between two candidates both of whom have received large contributions from attorneys and/or litigants who will appear before that candidate. Any argument that the citizens of Ohio approve of this process is spurious. A 2002 poll conducted by the League of Women Voters indicated that 83% of voters believed that "campaign contributions influence judges and candidates more than any other factor." *See*, Ohio Voter, Judicial Independence Project (The League of Women Voters of Ohio, Columbus, Ohio), Summer 2002, *available at* http://www.lwvohio.org/Voter%20 Newsletters /VOTER%20Summer%202002.pdf; *see also*, OhioImpact.org, Judicial Reform: Ensuring an Independent and Impartial Judiciary, http://www.ohioimpact.org/judicial-reform (last visited July 6, 2008). Two thirds of the voters believed that Ohio needed to undertake judicial reform. *Id.*

The problem of course is that voters do not write Ohio's Code of Judicial Conduct. The very individuals who are capable of reforming the system are those who stand to lose much by doing so. This sentiment has been articulated by legal professionals within Ohio for years: "[A]lthough there may be no good method of selecting and retaining judges, there is a worst method, and Ohio is among the states to have found it." Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 Cap. U. L. Rev. 455, 472 (2002). "That worst method is one in which judges qualify for their jobs by raising very large sums of money from lawyers, litigants, and special interest

groups, and retain their offices only by continuing to raise such funds." *Id.*

While this matter presents perhaps the most dramatic violation of a litigant's right to due process resulting from campaign contributions, it would be a mistake to suggest that Dupre is alone in suffering this type of constitutional injury. *See, White*, 536 U.S. at 789 (noting that Alabama, Pennsylvania, and Texas all suffered from the same maladies that afflict Ohio). Since *White*, the supreme courts of Illinois and West Virginia have joined the proverbial club of States where wealthy contributors have supported judicial candidates who eventually overturned large judgments levied against those contributors. *See, e.g., A.T. Massey,* 2008 W.Va. LEXIS 22, *see also,* Carter, *supra*. ("In November, Illinois upstaged [O]hio in what critics call the race to the bottom.")

The violence that this type of conduct unleashes upon the public's faith in the system cannot be overstated. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 opinion survey conducted by Zogby International. *Americans Speak Out on Judicial Elections*, Justice at Stake Campaign, March 2004 Survey Highlights, http://faircourts.org/files/ZogbyPoll FActSheet.pdf. As a result, 79 percent of the registered voters polled believe that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaigns." Greenberg Quinlan Rosner Research & American Research Inc., Justice at Stake Frequency Questionnaire (2001) at p. 10, question 70, *available at*

http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf. The viewpoint expressed by the public is not limited to laypersons. According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half of the judges surveyed (46 percent) themselves believe that campaign contributions to judges influence their decisions. Greenberg Quinlan Rosner Research & American Research Inc., Justice at Stake State Judges Frequency Questionnaire (2001) at p. 11, question 31, *available at* http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. As a result, more than 55 percent of state court judges believe that they "should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

Both the press and a former member of this Court have joined the chorus of those who believe that the state judicial systems can no longer credibly sustain themselves in this fashion. In April of this year, Justice Sandra Day O'Connor cut to the heart of the issue: "We put cash in the courtrooms, and it's just wrong." *See*, Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'* The N.Y. Times, April 15, 2008, at A22. In an editorial in Parade Magazine, Justice Sandra Day O'Connor observed that the current system made it difficult to conclude that the victorious candidates were in fact fair and impartial. Justice Sandra Day O'Connor, *How To Save Our Courts*, Parade Magazine, Feb. 24, 2008, at 4. "When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial." *Id.* The national press has joined the local

publications in decrying the flaws in the state judicial systems. *See, e.g.*, Robert Barnes, *Judicial Races Now Rife With Politics*, The Washington Post, Oct. 11, 2007, at A01.

This Court has noted that the public's faith in the rule of law is the foundation of the system and that the appearance of impartiality provides legitimacy for the judicial branch of the government. *See, e.g., N.Y. State Bd. of Elections v. Lopez Torres,* 128 S. Ct. 791, 803 (2008) (Kennedy concurring)("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges."), *see also, Mistretta v. United States*, 488 U.S. 361, 407 (1989). When the public, the press, and a former Justice of this Court are openly questioning both the impartiality of state court judges and the application of the rule of law, how long can the state court systems continue to effectively function? How long will it be before prudent attorneys, who are not able to contribute large sums, begin filing in or removing every eligible action to federal court?

While the public's faith in, and the continued functionality of, the state court systems are compelling reasons to grant Dupre's Petition, they are not the best reasons. The critical reason for this Court to accept jurisdiction is that if it does not, no other institution will prevent violations of due process that will be suffered upon many more citizens throughout the States. The President has no constitutional ability to address the issue. Congress has declined to exercise whatever power it may have in accordance with the Fourteenth Amendment. So the people suffer while,

with one exception, the various state supreme courts publically lament over the inequities of the current judicial systems but do nothing to change them. Again, it is not in their perceived interests to do so. If judicial candidates have to disqualify themselves from matters involving their biggest contributors, then their biggest contributors will cease contributing large sums.

The Framers contemplated the reality that officeholders would often act out of their own self interest. *See, Morrison v. Olson*, (1988), 487 U.S. 654, 698 (Scalia dissenting) ("But just as the mere words of the Bill of Rights are not self-effectuating, the Framers recognized the '[i]nsufficiency of a mere parchment delineation of the boundaries' to achieve the separation of powers."), *citing*, Federalist No. 73, p. 442 (A. Hamilton). This is also why the separation of powers includes the separation of power between the state and federal systems. Indeed, diversity jurisdiction of the federal courts exists precisely because of the concern that citizens of one state might not be treated fairly by judges of a separate state. The Federalist No. 80 (A. Hamilton) ("The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself."); *see also, Bank of the U.S. v. Deveaux,* 9 U.S. 61, 87 (1809) ("However, true the fact may be, that the tribunals of states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of

controversies between alien and a citizen, or between citizens of different states.")

Here, Dupre, a resident of Chicago, Illinois, had Ohio's forum selected for him by a *de facto* defendant posturing as a putative plaintiff via a declaratory judgment action. He did not contribute to the judicial candidates for the Ohio courts. He had no democratic say as to how Ohio's campaign finance laws were written or enforced. Dupre had absolutely no input into the contents of the Ohio Code of Judicial Conduct.

Long ago, this Court recognized its constitutional ability, even its obligation, to direct State actors to comply with the United States Constitution in order to protect the citizens of the United States. *See, Cooper v. Aaron,* 358 U.S. 1, 18 (1958) ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); *see also, Baker v. Carr*, 369 U.S. 186, 226 (1962) (rejecting a "political question" argument and concluding that "[t]he question here is the consistency of the state action with the Federal Constitution.") The practice of judges and justices presiding over cases where one of the litigants has contributed exorbitant sums to their campaigns can be argued to be historically recent. However, in terms of real time, the practice has been ongoing for more than a decade and grows worse with every passing year. In response to this trend, Dupre implores this Court: Please, wait no more. Dupre needs this Court to hear the matter lest his constitutional right to an impartial tribunal be discarded as an aspiration without the force of law. The people need *their* Court to stop the sale of justice. For, if this Court will not, no other institution will.

CONCLUSION

This case represents the rarest of cases where only this Court has the ability to preserve and protect Dupre's rights afforded by the United States Constitution. It should grant Dupre's petition and issue a writ of certiorari.

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